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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

JEROME L. DOFF, *et al.*,

Petitioner,

vs.

BRUNSWICK CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.

1. May a party be adjudged to be in contempt of Court on account of an *initial* invocation of a claim of privilege to decline answering an interrogatory on the grounds that the answer would violate his 5th Amendment privilege against self incrimination?

2. Where the legal question as to the availability of a 5th Amendment claim of privilege is one upon which fair and reasonable minds can differ, may the District Court, upon determining that the claim of privilege should be disallowed, hold the party claiming the privilege in contempt of Court for claiming the privilege, or, rather, is the District Court limited to making an order requiring that the interrogatory be answered, without objection, in this situation (*i.e.*, can it ever be a contempt of Court to merely be "wrong" on a difficult legal question)?

3. Should some requirement be placed upon the District Courts, as a matter of public policy, to permit a party claiming a constitutional privilege to "replead" the factual basis for the claim where the Court is of the opinion that the initial pleading of the basis for the claim is insufficiently detailed?

4. As a corollary to Question 3, should the District Court be required to consider also the nature and extent of the interest of the questioner in the information sought, or is it sufficient to focus exclusively on the sufficiency of the statement claiming the privilege without regard to any consideration of the legal significance of the questioner's need to know?

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Petitioner, Jerome L. Doff, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 30, 1981.

Opinion Below.

The published opinion of the Court of Appeals appears in the appendix hereto. No opinion was rendered by the District Court for the Central District of California.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 30, 1981. A timely petition for rehearing en banc was denied on April 16, 1981, and this

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Rule Involved.

Rules of Civil Procedure, Rule 37(b)(2)(D):

> "If a party . . . fails to obey an order to provide or permit discovery, . . . the Court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * *
>
> "(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of Court the failure to obey any orders except an order to submit to a physical or mental examination."

Statement of the Case.

In 1964, Brunswick Corporation was awarded a judgment against Doff in the United States District Court for the Central District of California. The District Court's jurisdiction was invoked based on diversity of citizenship. In 1975, Brunswick brought the instant action to maintain the enforceability of the prior money judgment, and was awarded summary judgment.

On August 24, 1976, Brunswick filed and served upon Doff interrogatories inquiring into his current financial condition. Originally, 69 interrogatories, many with a number of sub-interrogatories, were propounded. (Reprinting the interrogatories, and responses thereto, in the appendix of Appellee's Brief required over 50 pages.)

On February 6, 1978, Doff served and filed responses to the 69 interrogatories. On April 10, 1978, the District Court ordered Doff to further answer 17 of the original 69 interrogatories. Significantly, the Court required that the information be current as of the date of his further answers,

whereas the questions as originally propounded had consistently requested information "through the date on which these interrogatories were served", thus substantially changing the questions.

On August 1, 1978, Doff served and filed "further answers" to the remaining 17 interrogatories. Brunswick evidently deemed 10 of the 17 further answers to be sufficient, but was dissatisfied with 7 of them and brought a motion seeking an order requiring further answers and appropriate penalties. As to 3 of the 7 interrogatories, Doff reiterated that he was hampered in responding because of a burglary-theft of many of his business records, and then went beyond his original answer that the income he had received had been insubstantial or "minimal," and made an attempt to state approximate dollar estimates, such as "approximately $25,000.00." As to the remaining 4 problematical further answers, Doff's response was:

> "I hereby invoke the 5th Amendment to the United States Constitution, and thus refuse to answer this interrogatory on the grounds that my answer may tend to incriminate me."

In the case of 3 of the 4 invocations of the privilege, Doff had not asserted the privilege in his original answer to that interrogatory. In the case of Interrogatory No. 69, inquiring as to whether he had filed federal and state income tax returns in various years, and if so the date of the filing, and the amount reported therein as adjusted gross income, Doff had invoked the privilege in his original answer.

The District Court held Doff in contempt on account of his further answers to the 7 problematical interrogatories, required him to make a payment to Brunswick for having had to bring the motion, and imposed sanctions, payable to the Court, of $1,500.00, plus an ongoing penalty of $100.00 per day for each day after this October 2, 1978

Order that Doff "remained in contempt" by failing to answer further the remaining 7 interrogatories.

The Court of Appeals affirmed the contempt order, holding that Doff had failed to properly support his claim of privilege and that the District Court was not required to have been impressed by the answers supplied to the 3 interrogatories that did not involve a claim of privilege. (On this latter point, the opinion of the Court of Appeals focuses upon the *original* answers, and says nothing with respect to the further answers upon which the contempt order might arguably have been based.)

REASONS FOR GRANTING THE WRIT.

If the District Court had simply made an order requiring further answers, as opposed to a contempt order accompanied by a $100.00 per day penalty until another set of further answers was supplied, Petitioner would certainly not be seeking the attention of this Court. But invoking the contempt power, in the circumstances of the instant case, represents a serious overreaching and abuse of the contempt power that so far departs from the accepted and unusual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In view of the fact that the April 10, 1978 order requiring further answers changed the question (by requiring answers for the period between the date of service of the interrogatories in August of 1976 and the further answers in 1978), it must be recognized that, as a practical matter, Doff's "further answers" were his first response to the questions as thus revised. Even assuming, as the Court of Appeals held, that the claim of privilege was not sufficiently factually supported, the District Court was still not at liberty to adjudge him in contempt for claiming, *once*, that he was entitled to decline to answer the question based upon the existence of a constitutional privilege.

It is the sovereign prerogative of a citizen to, whether destined to ultimately prevail or not, at least *claim* the right to assert the existence of constitutional protection. If a dispute develops between the parties as to whether the claim is well-founded, the Court may, of course, adjudicate that claim and, if appropriate, make an order disallowing the claim of privilege and requiring answers to the interrogatories. But claiming, once, the existence of a constitutional privilege simply is not contempt of Court. Adjudicating the bona fides of such claims, and other disputes, is the reason

for existence of Courts, and it simply cannot be contempt of Court to ask the Court to adjudicate such a dispute.

It may be contemptuous to *continue* to simply reassert and reassert such a claim in the face of an adverse ruling thereon (refusing to accept and respect the ruling of the Court) — but such is simply not the case here.

Compounding the inappropriateness of the contempt adjudication here is the fact that Doff's claim of privilege gives rise to a legal question upon which reasonable men can differ. As the concurring opinion in the instant case recognized, the issue was one "raising serious and substantial questions of first impression." It is a rather black day in the history of American jurisprudence when one can raise a legitimate, difficult question of first impression, and find himself adjudicated in contempt of Court for having done so. Simply stated, it is not, and it can never be, contempt of Court to have an honest, good faith difference of legal judgment or opinion with the Court on such a question. When the contempt power is so abused, it becomes unfortunately necessary to invoke the supervisory authority of this Court.

The instant case also presents a question that surely occurs with considerable frequency and warrants the guidance of this Court: When a claim of privilege is inartfully stated, should the District Courts be at least encouraged, as a matter of policy, to offer an opportunity to supplement the inartful claim of privilege? As the opinion of the Court of Appeals recognizes, such a claimant is in the difficult position of trying to reveal enough to make a sufficient showing and support of his claim without at the same time revealing so much that the claim of privilege becomes useless. Constitutional rights should not turn solely upon one's ability to artfully walk such a tightrope. The District Courts should be under a duty to at least inquire as to whether the party

believes he can, if offered an opportunity to supplement his statement, make a stronger showing.

The instant case also forcefully points out the advisability of requiring District Courts to apply a balancing test to the appropriateness of the claim of privilege. Interrogatory No. 69 in the instant case, dealing with tax return filings, dramatically presents the question. Granting that Doff's claim of privilege is not particularly detailed, at least with respect to this interrogatory, it should not need to be. It is frankly none of Brunswick's business whether Doff has filed tax returns over the last several years, and knowing whether he has or not has no tendency whatsoever to give any indication as to where Brunswick might find a single asset that he might have. The same is true, only more so, with respect to Brunswick's mere curiosity as to the date of filing the income tax returns.

For the foregoing reasons, although at first glance the instant case might appear to be too trivial to warrant the attention of this Court, Petitioner respectfully prays for the assistance of this Court in correcting a most serious injustice. The case is not really about post-judgment interrogatory answers; what it is really about is a very serious departure from some of the most fundamental concepts held by our people as to the proper relationship between the citizenry and the Courts.

Respectfully submitted,

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Jerome Doff.

APPENDIX A.

Opinion.

United States Court of Appeals, Ninth Circuit.

Brunswick Corporation, Appellant, v. Jerome Doff, Appellee, No. 79-3011.

Argued and Submitted Dec. 4, 1980.

Decided Jan. 30, 1981.

Appeal from the United States District Court for the Central District of California.

Before Gibson,* Sneed and Tang, Circuit Judges.

Sneed, Circuit Judge:

Jerome Doff appeals from a contempt order entered against him for failing to answer interrogatories propounded by Brunswick. He contends that the district court abused its discretion because he answered some interrogatories to the best of his ability and, as to the others, he validly invoked his Fifth Amendment privilege not to incriminate himself. Brunswick, on the other hand, argues that Doff waived his Fifth Amendment privilege because (1) the claim was untimely raised; (2) Doff failed properly to support his claim below; and (3) Doff initially answered the interrogatories. Brunswick further contends that the district court properly rejected Doff's excuse that he could not answer further because his records had been stolen.

I.

Fifth Amendment Claim

We need address only the second of Brunswick's claims with respect to Doff's assertion of his Fifth Amendment privilege because, if correct as to it, the issue whether Doff

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*Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

has waived his privilege in one manner or another is irrelevant. We hold that Doff did fail properly to support his claim below. We do so on the basis that the privilege normally is not asserted properly by merely declaring that an answer will incriminate. It is not necessary, of course, that the person to whom the question has been put establish the precise manner in which he will incriminate himself by responding. This would make the privilege useless. As the Supreme Court said in *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951):

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Doff failed to meet this modest standard.

Interrogatories 30, 32, and 37 were directed specifically at what assets, if any, were owned by Doff. His initial answers left much to be desired in terms of specificity and made reasonable the district court's order that additional answers be provided. The invocation of the privilege by Doff with respect to providing additional answers was accompanied by nothing other than a bald assertion of the privilege. In no way does it appear that more responsive answers would incriminate Doff. That such answers might assist Brunswick in collecting the amount of its debt does not amount to incrimination within the scope of the privilege. A debtor such as Doff cannot conceal such assets as he might own merely by uttering the incantation "I hereby invoke the Fifth Amendment to the United States Constitution and thus refuse to answer this interrogatory on the grounds that my answer may tend to incriminate me." Appendix B, Appellee's Brief 52-54. It is not evident from the setting in which the questions were asked that respon-

sive answers or explanations would incriminate. *Cf. United States v. Neff*, 615 F.2d 1235 (9th Cir. 1980).

Appellant argues strongly that, whatever might be the propriety of his invocation of the privilege with respect to interrogatories 30, 32, and 37, the refusal to answer interrogatory 69 on the grounds of the privilege was proper. That interrogatory asked whether Doff had filed federal and state income tax returns for the years 1971 through 1975, the date any such returns were filed, and the amount of adjusted gross income reported thereon. On the record before us we see no way in which answers to this interrogatory would tend to incriminate. Again a distinction between the unpleasantness of possibly revealing assets to a creditor and the tendency to incriminate within the meaning of the privilege must be drawn. While the possibility of the first is evident on this record, the second is not. Even responses indicating no returns had been filed would not on this record incriminate and, incidentally, would not be inconsistent necessarily with Doff's responses to interrogatories 30, 32, and 37.

We recognize that in cases such as this the need of the court to ascertain the legitimacy of a claim of the Fifth Amendment privilege exists in a state of tension with the need of the claimant to remain silent. The later need must always weigh heavily in the balance, but it cannot be permitted to weigh so heavily as to relieve the court of its duty to determine the legitimacy of the claim. This would be the result were we to hold that a mere Fifth Amendment privilege incantation is sufficient. *See United States v. Neff, supra* at 1240.

II.

Adequacy of Doff's Answers

The district court also appears not to have been impressed by the answers supplied to interrogatories 12, 15, and 22 which sought information concerning the amounts and

sources of various types of income of Doff. Nor need it have been inasmuch as Doff's answers indicated that the amounts were insubstantial or "minimal" and that, in any event, his records had been stolen from his residence. Such responses are not marked with badges of candor.

III.

The Absence of Findings of Facts and Conclusions of Law

Our review in this case has been hampered somewhat by the absence of any findings of facts or conclusions of law prepared by the trial court. Such findings and conclusions are not required by Rule 52(a), Fed.R.Civ.P., in a proceeding such as this which was commenced by a motion by Brunswick for an order of contempt, a motion not embraced by Rule 41(b), Fed.R.Civ.P. Nonetheless, to require proper findings and conclusions is within the power of this court when a lower court has entered a contempt order. *See Sanders v. Monsanto Co.*, 574 F.2d 198, 200 (5th Cir. 1978). Consideration was given to remanding for the preparation of findings and conclusions in this case. Our decision to affirm without a remand is based on the high level of contumaciousness on the part of Doff that this record reflects. Under less compelling circumstances a remand clearly would have been desirable.

Affirmed.

Tang, Circuit Judge, concurring in result.

I concur reluctantly, in the result. I question whether the district court gave adequate consideration to the defendant's fifth amendment claim, an issue raising serious and substantial questions of first impression. Given the defendant's contumacy, the district court's loss of patience is perfectly understandable. A statement of the bases of the district court's determination, however, would have materially facilitated review.

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit. Brunswick Corporation, Appellant, v. Jerome Doff, Appellee, No. 79-3011.

Filed, April 16, 1981.

Before: Gibson,* Sneed and Tang, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.